

IN PRACTICE

CIVIL PROCEDURE

Enforcement of a Third-Party Subpoena

Consider and execute an individualized approach

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You need to obtain information and documents from a third party, but how do you obtain the information and documents in an efficient manner? What do you do if the third party ignores your subpoena?

It is common discovery practice in civil litigation to subpoena third-party individuals and business entities for production of designated evidence and appearance at depositions. If the third party fails to respond, there are formal and informal means available to secure compliance. Rather than engaging in a standard process of enforcing a third-party subpoena, it is important to consider what approach will be effective and efficient to secure prompt production of evidence from the particular third party.

A party seeking discovery of evidence from a third party must request such production at a scheduled deposition. R. 4:14-7(c). Court rules require subpoenas to state that the evidence

shall not be produced or released until the date specified for the taking of the deposition. R. 4:14-7(c). The subpoena must also state that if the third party is notified that a motion to quash the subpoena has been filed, the third party shall not produce or release the evidence until ordered by the Court or by consent of all parties to the action. R. 4:14-7(c).

The subpoena must be served on the third party and parties no less than 10 days before the deposition. Pursuant to R. 4:4-4, the subpoena must be personally served on the third party. Regular or certified mail of a subpoena to a third party is not proper service. Serving a subpoena in accordance with R. 1:9 puts all parties on notice and if they object to the subpoena, they may file a motion to quash. If a motion to quash is not filed, then the third party must attend the scheduled deposition and produce the requested evidence. R. 1:9-2. In the alternative, if the parties agree, the third party may produce the subpoenaed evidence after the scheduled date of deposition without having to attend the deposition.

In certain cases, third-party individuals and business entities do not respond promptly to subpoenas. Often

times, informal means are effective to secure compliance with subpoenas. A phone conversation with the third party individual or appropriate representative of the business entity may be sufficient. You could explain that a subpoena is in fact an official court document issued in the name of the clerk of court. If you are speaking with a representative of a business entity, you could seek identification of the particular person who typically responds to subpoenas. This information could be important if formal means of enforcement become necessary.

Written correspondence to the third party via certified mail is also advisable since it would serve as an exhibit in the event motion practice is necessary. When the third-party individual or business entity fails to respond to informal attempts to enforce the subpoena, you may choose to advise them in writing that if they do not provide the subpoenaed evidence within a certain amount of time, you will have to inform the Court of their disregard of the subpoena. Of course, motion practice is not the preferred course of action because it can be expensive for the client and may further delay the proceedings.

When informal means are not effective, court intervention is the only recourse. There are formal means of enforcing a subpoena on a third party, through motion practice requiring immediate compliance with the subpoena pursuant to R.1:10-3, financial sanctions and the issuance and execution of arrest warrants for contempt of court. A person's failure to appear without ade-

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quate excuse to obey a subpoena may be deemed contempt of court per R. 1:9-5. The sanctions of R. 1:2-4 are applicable to such a failure to appear. In preparing this formal application, you will want to identify and seek specific relief that will be an appropriate mechanism to persuade the particular third party to respond to the subpoena.

For example, if the third-party subpoena is directed to an individual, you will want to consider whether financial sanctions would be effective as a mechanism to compel enforcement. If you suspect that the third-party individual may not have financial resources at risk, then it may be more effective to seek the contempt sanction of arrest and confinement until the individual complies with the subpoena.

Financial sanctions for contempt of third-party subpoenas issued to business entities may be more effective than issuance and execution of arrest warrants. There are practical challenges in executing an arrest warrant issued against a business entity. If a specific individual is not identified in the subpoena or court order, a sheriff's officer would have difficulty identifying who to arrest at the business entity. In fact, corporate officers of the business entity may not have any knowledge of the subpoena.

In the first formal application to enforce the subpoena, you may choose to seek an order (1) adjudicating that the third party violated the litigant's rights of your client as stated in R.1:10-3 by failure to comply with the subpoena; (2) compelling the third party to immediately furnish evidence as required by the subpoena; (3) directing that, if the third party fails to furnish answers as required by the subpoena within a certain period of time, the third party shall be arrested and confined in the county jail until the third party complies with the subpoena; and/or (4) directing the third party to pay financial sanctions, including the attorney's fees and costs incurred in connection with enforcement of the subpoena.

Unless the behavior of the third party is particularly egregious, the court may choose not to award financial sanctions in the initial application for enforcement of the subpoena. Another issue to consider is personal service of the initial order compelling compliance with the subpoena. That way, the third party cannot claim ignorance to the proceedings. The return of service would also serve as an exhibit for a second application for contempt, if necessary.

If the third party does not comply with the initial order, you may choose to notify the court and apply for the issuance of a warrant for the third party's arrest or file a second application seeking monetary sanctions for contempt. You may choose to seek an escalating monetary sanction for every day and week the subpoenaed evidence is not produced after the initial order is entered.

Should you seek issuance and execution of an arrest warrant, the court may request a certification under R.1:10 attesting to your efforts in serving the subpoena and initial order requiring compliance. Following issuance of the arrest warrant, you may want to provide a copy of the warrant to the sheriff's department directly to ensure their receipt of same. Written and verbal interaction with the sheriff's department is an important part of this process.

In speaking with the sheriff's department, you may want to inquire when the warrant will be executed by the sheriff's officer so that you and your adversary may be present when the third party is brought before the court. It is advisable to schedule a specific time when the warrant can be executed to ensure your availability to appear in court. Of course, that will not guarantee that the third party will be present at their residence or place of business when the sheriff's officer attempts to execute the warrant.

For sheriff's officers occupied with many civil and criminal matters and limited staffing, it can be difficult to prioritize enforcement of an arrest warrant

related to a third party subpoena in a civil matter. Therefore, it is worthwhile identifying the particular sheriff's officer handling the execution of the warrant and following up with them often both in writing and by telephone.

Since the court establishes definitive deadlines for discovery, you may want to communicate to the sheriff's officer the importance of having the warrant served as soon as possible. Your written correspondence to the sheriff's officer shows diligence in pursuing the third-party evidence which may be helpful as exhibits to applications to the court for an extension of the discovery period.

If the third party is brought before the court upon the execution of the arrest warrant, you will want to inquire into the location of the evidence requested in the subpoena. It is unlikely that the third party will appear in court with evidence responsive to the subpoena. Therefore, you could request the judge to order the party to appear at a scheduled deposition with all evidence requested by the subpoena. The judge may be willing to enter an order stating that if the third party fails to appear for the scheduled deposition, a warrant will immediately be issued for his or her arrest.

In certain cases, the formal process of enforcing a third-party subpoena can take several months. Therefore, it is important to seek extensions of discovery deadlines by consent and motion as needed. You could tie the new discovery deadlines to the production of the evidence by the third party.

In civil litigation, formal and informal enforcement of each third-party subpoena presents a unique challenge. Ultimately, you are seeking production of documents and information from the third party. Consideration and execution of an individualized approach driven to encourage a prompt response from the particular third party will increase the effectiveness and efficiency of the process. ■